

OCT 4 2000

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

ARCH COMMUNICATIONS GROUP, INC.
and PAGING NETWORK, INC.

For Consent to Transfer Control of Paging,
Narrowband PCS, and Other Licenses

)
)
) WT Docket No. 99-365
) File No. 0000053846, *et al.*
) DA 99-3028

To: Chief, Wireless Telecommunications Bureau

MOTION FOR STAY PENDING RECONSIDERATION

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SUMMARY

Good cause exists for the FCC to stay the effectiveness of its order authorizing the Arch/PageNet merger. Metrocall's Petition raises serious issues concerning the exercise of control by commercial lenders over FCC licenses. Absent a stay, there may not be an opportunity for the FCC to review and decide those issues of compliance with the Act and its rules, prior to consummation of the merger. PageNet's bond holders, creditors, and shareholders will be irreparably harmed if the merger closes, and the FCC subsequently finds that its order must be reversed based on a substantial change of control over the licenses.

The confirmation hearing on the Arch/PageNet Amended Plan is scheduled for October 26, 2000, and Arch and PageNet have indicated their intention to close the merger quickly following confirmation of the Amended Plan. The requested stay is necessary if the FCC is to have an opportunity to review Metrocall's allegations concerning licensee control, and take such action as it deems appropriate, before the *status quo* of this proceeding has changed. Metrocall has presented the FCC with evidence demonstrating that at least one version of Arch's credit facility would have required Arch to sell specified FCC licenses. Filings with the Bankruptcy Court have made it plain that Arch's and PageNet's creditors perceive these FCC licenses as "their collateral." Absent prompt action, there is a risk that the Bankruptcy Court may decide the issues concerning the permissible level of control over the subject FCC licenses, without the FCC having been given a chance to exercise its jurisdiction over those issues.

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To: Chief, Wireless Telecommunications Bureau

MOTION FOR STAY PENDING RECONSIDERATION

Metrocall, Inc. ("Metrocall"), by its attorneys and pursuant to Section 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 405 (a) (the "Act"), and Sections 1.43 and 1.429 (k) of the Commission's Rules, 47 C.F.R. § 1.43, 1.429 (k), hereby submits this Motion for Stay pending review of its recently filed "Petition for Reconsideration or Informal Complaint" concerning the above-captioned transfer of control application. Metrocall submits that good cause exists to stay immediately the effectiveness of the FCC's April 25, 2000 order approving these transfer applications pending review of Metrocall's Petition. In support of this Motion, the following is respectfully shown:

I. Background.

On or about November 7, 1999, Arch and PageNet executed an Agreement and Plan of Merger, which was amended on or about January 7, 2000, May 10, 2000 and July 24, 2000 (the "Merger Agreement"). On or about December 13, 1999, Arch and PageNet filed the Merger

Applications with the Commission seeking its consent to the transfer of control of both companies, in connection with their proposed merger. See File Nos. 0000056159, *et al.* Under the terms of the Arch/PageNet Merger Agreement, a newly-created, wholly-owned subsidiary of Arch would merge with and into a reorganized PageNet. Id. at “Main Pleading/Description of Transaction.” Under the Merger Agreement, PageNet’s shareholders and bondholders are to receive, among other things, shares of Arch common stock. In addition, certain shareholders and noteholders of Arch are also to receive, among other things, shares of Arch common stock. Id. In support of the Merger Applications, Arch and PageNet pointed to Arch’s status as the licensee of numerous Commercial Mobile Radio Service (“CMRS”) licenses as proof of Arch’s qualifications. Id. at 12. The parties also indicated in the Merger Applications that Arch was “financially qualified to acquire control of PageNet and [had] adequate resources to undertake and consummate the merger[.]” Id.

The Merger Applications were accepted for filing on December 30, 1999¹ and were granted on April 25, 2000.² On July 24, 2000, PageNet consented to the involuntary bankruptcy petitions previously filed against it in the United States Bankruptcy Court for the District of Delaware by three of its creditors. That same day, PageNet also filed voluntary bankruptcy petitions for its domestic operating subsidiaries (excluding Vast Solutions, Inc.) under Chapter 11 of the Bankruptcy Code, and submitted to the Bankruptcy Court a proposed plan of reorganization (the “Plan”). On August 21, 2000, Metrocall obtained an order of the Bankruptcy Court which, among other things, (i) permitted Metrocall to conduct limited and expedited due

1 See Public Notice, DA 99-3028 (released December 30, 1999).

2 Memorandum Opinion and Order, DA 00-925, (released April 25, 2000) (the “Arch/PageNet Order”).

diligence of PageNet, and (ii) scheduled a hearing before the Bankruptcy Court on September 7, 2000, at 3:00 p.m., with respect to Metrocall's request to file its contemplated acquisition offer for PageNet. A hearing was also scheduled on that day to consider the adequacy of the disclosure statement with respect to the Plan.

Shortly after 1:00 p.m. on the day of the September 7th hearing, PageNet submitted to the Bankruptcy Court an amended version of the Plan (the "Amended Plan"). In that Amended Plan, Arch demonstrated for the first time its intention to amend its credit facility to provide, *inter alia*, at the direction of its secured lenders, that Arch be obligated to sell PageNet's Specialized Mobile Radio ("SMR") licenses within one year of the "Effective Date" of the Amended Plan for a minimum cash price.³

Soon after Arch disclosed this version of its Amended Plan to Metrocall, and upon learning almost immediately thereafter that Metrocall believed (and so advised the Bankruptcy Court) that such revision to the Amended Plan might violate the Act and the FCC's Rules, at least two subsequent versions of the Plan were prepared and tendered to Metrocall and to certain other parties in interest.

On September 12, 2000, Metrocall filed a Petition for Reconsideration or Informal Complaint (the "Petition") with the Commission, providing copies of the pertinent portions of each of the three versions of the Amended Plan. Metrocall explained that the proposed amendments to Arch's credit facility demonstrated that Arch had abdicated control over the SMR

³ The Effective Date is an as-yet-undetermined date after confirmation of the Amended Plan and satisfaction or waiver of certain conditions. See Amended Plan, Section I.B(48). Pursuant to Section V.B. of the Amended Plan, the merger will occur on the Effective Date.

licenses – or such other licenses as its lenders might be willing to permit it to liquidate for their repayment – to its secured creditors. On September 22, 2000, PageNet filed a Motion to Dismiss (the “Motion”) Metrocall’s Petition, and Arch filed an Opposition. Neither party acknowledged any FCC Rule violations, nor did they disclose any plans to amend the subject application to notify the FCC of any changes in control concerning the SMR or other licenses now controlled by Arch’s lenders.

Instead, both PageNet and Arch stated that the Commission’s prior grant of the above-captioned applications, which was issued before any disclosure statement or plan amendments, was final, and they expressed their intent to close the merger as soon as possible. See Motion at p.3; Opposition at p.2. Indeed, in recent filings with the Bankruptcy Court, both Arch and the Creditor’s Committee seemed to suggest that the FCC did not have authority to set-aside the captioned applications and return them to the *status quo ante*, unless Metrocall specifically requested injunctive relief from the FCC as part of the Petition’s request for agency action. See Response of Creditor’s Committee at pp. 8, 16; Response of Arch at p. 7 (copies of the pertinent pages of these pleadings are attached hereto as Exhibit One).

Moreover, also on September 7, 2000 the Bankruptcy Court, without any notice to the FCC, entered its Final Order Authorizing Debtors In Possession to Enter into Post-Petition Financing (the “DIP Financing Order”), which grants liens in all of PageNet’s assets, “including, without limitation, all ... licenses,” to the Arch/PageNet lenders, contrary to applicable FCC precedent. See DIP Financing Order, attached to the concurrently-filed Reply as Reply Exhibit One at ¶ 8. Such liens include a post-petition lien to cover new borrowings by PageNet during the bankruptcy proceeding and a lien which secures the lenders’ pre-petition claims to the extent

of any diminution in the value of their collateral. See DIP Financing Order at ¶¶ 8 and 10.

In light of these facts, and in response to Arch's contentions, Metrocall is filing this Motion.

II. The Applicable Standards for Grant of a Stay

The Wireless Telecommunications Bureau may grant a stay pending review of a petition for reconsideration "in its discretion." See 47 C.F.R. §1.102(b)(2). That standard is more flexible than the judicial standard for obtaining injunctive relief. For instance, the FCC may grant a stay pending reconsideration even where a movant has *not* shown any likelihood of success on the merits. See, e.g., Angeles Broadcasting Network, 59 RR2d 758 (1985) (stay granted to avoid interruption of service to the public despite petition's lack of merits). In other cases, the Commission has granted a stay though there was no showing of "irreparable injury", which is typically a necessary element to obtain a judicial injunction. See Lompoc Valley Cable TV, 1 RR2d 1081 (1964) (stay granted due to "policy questions" raised by the petitioner).

In short, the FCC does not need to apply any rigid "test" or formula to grant a stay pending review of a petition for reconsideration. Each stay request should be reviewed on the merits, with a stay granted when there is a sufficient showing of good cause. A stay is a "proper means of maintaining the status quo pending final action on the petitions for reconsideration." Arizona Mobile Telephone Company, 66 FCC2d 691 at ¶ 13 (1977). A stay in this instance will provide the FCC the opportunity to review the pending Petition, "study the ... pleadings, conduct the proper research", and craft an order that will address the issues raised in the Petition. Id. at ¶ 13.

III. Metrocall's Petition Meets the Standards for Grant of a Stay

Metrocall's Petition meets the applicable standards for a grant of a stay. The Petition raises serious issues concerning possible violations of the Act and the FCC's Rules. It will be difficult, if not impossible, for the FCC to order the relevant parties to cure such defects once the Arch/PageNet merger has been consummated, without causing financial harm, and further unnecessary delays, to all interested parties in this proceeding, including PageNet's bondholders, creditors and shareholders.⁴ Moreover, since the issues raised in Metrocall's Petition bear directly upon the qualifications of the proposed transferee, the public interest obviously requires that these issues be addressed prior to consummation of this merger. See, e.g., Roy M. Speer, 11 FCC Rcd. 14684 (1996) (effectiveness of transfer of control stayed where allegations were brought to the Commission's attention that the seller may have exercised unauthorized control over another licensee).

Although the Petition gave Arch the opportunity to respond to and resolve these issues; the responsive pleadings fail to allay concerns about an unauthorized transfer of control; hence, a stay of this licensing decision is eminently appropriate. It has long been recognized that an entity's control over a licensee's finances may give that entity control over the licensee. See, e.g., KOWL, Inc., 49 FCC 2d 962, ¶ 4 (Rev. Bd. 1974), quoting Heitmeyer v. FCC, 95 F.2d 91, 99 (D.C. Cir. 1937) ("[i]t is well known that one of the most powerful and effective methods of

⁴ Metrocall will also suffer irreparable harm if this stay is not granted. Based on the current posture of the parties before the Bankruptcy Court, if the Court confirms the Amended Plan at the October 26th hearing, Metrocall will never have an opportunity to present its own amended plan. Metrocall initially raised its concerns about a transfer of control before the Bankruptcy Court at the September 7th hearing, and the Bankruptcy Court is well aware of the pendency of this action before the Commission. Because the violations asserted by Metrocall in its Petition directly bear upon the confirmability of the Amended Plan, there exists a significant risk that, absent a stay, the Bankruptcy Court will decide the transfer of control issues based upon the pleadings before it, without awaiting the FCC's determination, and

control of any business, organization, or institution, and one of the most potent causes of involuntary assignment of interests, is the control of finances”). The Arch credit facility and the DIP Financing Order have crossed the line that separates legitimate lender protections from unauthorized transfers of control.

Despite subsequent revisions to the Amended Plan, the evidence suggests that Arch and its lenders considered the SMR licenses as collateral to be liquidated for the partial repayment of Arch’s borrowings. Attached to Metrocall’s concurrently filed Reply pleading, as Reply Exhibit Two, is a copy of the pertinent page of the Response of the Official Committee of Unsecured Creditors (the “Committee”) in Opposition to Metrocall’s Amended and Restated Plan (the “Committee Response”), in which the Committee explains the meaning of the credit facility provisions Metrocall has challenged. According to the Committee, Arch’s banks perceive that Metrocall’s offer, rather than the proposed Arch credited facility, would devalue “their collateral (the SMR Spectrum)”. See Reply Exhibit Two.

It thus appears that subsequent versions of the Amended Plan, each of which gave Arch progressively more “discretion” in the manner in which it paid its banks the \$110 million, were simply attempts to “spin” the facts in a manner that would be palatable to this Commission. See Petition at Exhibit One through Exhibit Three. Consequently, the credit facility covenants at issue here have the same effect as would the exercise of a security interest in the SMR licenses. Moreover, it does not appear that Arch has objected to the grant by the Bankruptcy Court of a liens on all of PageNet’s licenses to secure both post-petition and pre-petition claims of the lenders. See Reply Exhibit One. There is thus a material and substantial question as to Arch’s

notwithstanding that this license review process is under the exclusive jurisdiction of the FCC. A stay would thus permit

willingness to permit FCC licenses it contemplates acquiring under the merger to serve as collateral of the lenders and thus be under their control.

Arch has apparently ceded control over a major policy decision – the decision to sell more than 120 licenses which would collectively comprise multiple local SMR systems and a ubiquitous nationwide network on one frequency block, as well as the terms on which that sale would occur – to institutional lenders, following the grant of Arch’s transfer of control applications to acquire those licenses, and without any disclosure to the Commission. A lender need not exercise control over the day-to-day operations of a debtor company, if the lender has the power to interfere sufficiently with the licensee’s policy or financial decisions; and in so doing, it may cross the line that separates a *bona fide* creditor from an undisclosed real party in interest. See, e.g., SaltAire Communications, Inc., 8 FCC Rcd. 6284 (1993) (impermissible control found where due to noteholders’ rights to earnings and assets, and requirements for noteholder consent, applicant would be unable to sell additional stock “as a practical matter”). The designation by Arch’s lenders of specific FCC licenses to serve as “collateral” for the partial, pre-default repayment of a licensee’s borrowings, or the inclusion of repayment terms that “as a practical matter” leave the licensee with little or no choice but to divest such licenses as the lenders may consent, crossed the line of what is permitted under the Act and the FCC’s Rules.

IV. The FCC has Authority to Grant this Motion

Despite expiration of the formal reconsideration period, the FCC surely has authority to stay any further action in reliance on its April 25th order. Regardless of the “finality” of a decision, the Commission retains its plenary power over spectrum licensing, and where material

the Commission to exercise its exclusive jurisdiction to interpret the Act and its own Rules in the first instance.

facts relevant to the basis for a grant subsequently are disclosed to the Commission, it has both the authority and the duty to act. See, e.g., Communications and Control, Inc., 15 FCC Rcd. 5428, n.37 (2000) (FCC has authority to set aside grants made through inadvertent error); Brandywine Main-Line Radio, Inc., 60 FCC 2d 755 (1976) (petition for reconsideration filed three years after decision on appeal would be treated as request that the Commission ask the Court of Appeals to recall its mandate; allegations of improper Executive Branch influence in renewal proceeding considered); Central Alabama Broadcasters, Inc., 48 FCC 2d 998, ¶ 3 (1974) (untimely petition considered where it raised character qualifications issues). Consequently, even assuming arguendo that Metrocall's Petition did not comport with any of the procedures for petitions for reconsideration or informal complaints, the Commission nonetheless has an obligation to review new allegations bringing to its attention violations of the Act or the Rules, or that raise serious public interest considerations. See, e.g., Central Alabama Broadcasters, supra.

In this case, Arch's lenders proposed to take the extraordinary step of requiring the future licensee of PageNet's facilities to sell specified FCC licenses. Arch and PageNet's Amended Plan, as presented to the Bankruptcy Court on September 7, 2000, clearly stated that the SMR licenses were to be sold. See Petition at Exhibit One. Only after Metrocall pointed out the transfer of control issues inherent in allowing lenders to designate the disposition of FCC licenses (including the timing and minimum purchase price for that disposition), did Arch twice revise the Amended Plan to include language which purportedly gave it greater discretion in raising the \$110 million required to meet its lenders' repayment demands. See Petition at Exhibits Two and Three. Similarly, the DIP Financing Order entered by the Bankruptcy Court granted security interests and liens on all of PageNet's assets, including the FCC licenses, without notice to the FCC and

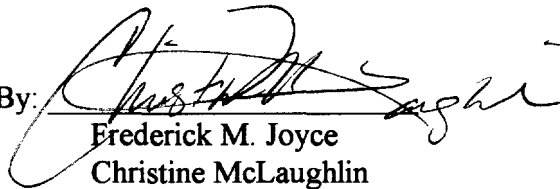
contrary to applicable FCC precedents. See Reply Exhibit One. To date, and presumably relying on Paragraph 17 of the DIP Financing Order, which requires any challenges to the liens granted under that order to be commenced within 60 days from the appointment of the Committee, neither PageNet, Arch, nor the banks have sought to amend the language at Paragraphs 8 and 10 of the DIP Financing Order to exclude the FCC licenses from the definition of “Post-Petition Collateral.” Thus, these revisions to the credit facility on which Arch is relying to consummate its merger with PageNet, that in at least one version *required* the divestiture of FCC licenses, and the liens granted to the banks under the DIP Financing Order, warrant, at a minimum, a stay pending further and complete investigation. See, e.g., Edwin A. Bernstein, 6 FCC Rcd. 6841 (Rev. Bd. 1991) (supplemental hearing ordered where successful applicant had failed to disclose change in lender and financing plans).

CONCLUSION

For all the foregoing reasons, "good cause" exists under FCC precedents for the FCC to set-aside and stay the effectiveness of the FCC's order approving the above-captioned transfer of control applications pending review of the serious allegations concerning unauthorized transfer of control set forth in Metrocall's Petition. See Arizona Mobile Telephone Company, 66 FCC2d 691 at ¶ 13 (a stay is a "proper means of maintaining the status quo pending final action on the petitions for reconsideration").

Respectfully submitted,

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October 4, 2000

EXHIBIT ONE

Committee agreed, among other things, to oppose any motion to terminate exclusivity so that the Arch plan could go forward without distraction or delay.

20. Metrocall's efforts to obtain the support of PageNet's secured banks with the offer of a \$100 million paydown failed. The banks viewed Metrocall's proposal as merely a paydown from the proceeds of their collateral (the SMR Spectrum). Instead of supporting Metrocall, the banks obtained from Arch a covenant to pay \$110 million within a year *after* the closing of the Arch/PageNet merger. Although fulfilling this covenant could involve the sale of SMR licenses (or other FCC licenses), it made any FCC approval of such sale a *post-closing* event and did not threaten the timing of the Arch/PageNet merger. Although Metrocall has since filed an informal complaint with the FCC asserting that Arch's agreement violates the Communications Act, Metrocall did not ask the FCC to enjoin the Arch/PageNet merger.

21. On September 7, 2000, Metrocall informed the Court and the Committee that it was not able to obtain financing in connection with its September 5 Proposal. Metrocall's motion to terminate exclusivity was dismissed, without prejudice. Metrocall stated that it would be filing a new motion to terminate exclusivity. The parties agreed, and the Court approved, 4:00 p.m. on September 18, 2000 as the deadline for Metrocall to file any new motion to be heard on October 5, 2000.

22. On September 7, 2000, the Court entered an order approving the Debtors' first amended disclosure statement. The Committee submitted for inclusion in the disclosure statement a letter recommending that all Class 5 creditors vote in favor of the Plan.

Metrocall's September 18 Proposal,

financing agreements with its own banks or its own investors. Its own banks' commitment letters are subject to due diligence. Its regulatory hurdles have increased with the addition of Nextel as its partner. Metrocall has lost two months it could not afford to lose.

**III. Metrocall's Arguments Against the Arch Plan have
No Basis in Fact and No Relevance to this Motion.**

38. Unable to make its proposal more real, more certain and more expeditious, Metrocall has instead argued that the Arch Plan cannot be confirmed because of alleged violations of the Communications Act and the Bankruptcy Code.

39. With respect to alleged violations of the Communications Act, it suffices to say the Arch/PageNet merger was approved by the FCC last April and has become final. Metrocall's belated and untimely petition before the FCC does not seek injunctive relief and thus poses no bar to closing. There is no basis for Metrocall's request that this United States District Court, sitting in bankruptcy, should render an advisory opinion on the merits of a pleading filed before the Federal Communications Commission. Finally, the conduct Metrocall complains of -- Arch's agreement to pay down its banks within a year of closing, whether from the sale of SMR licenses or otherwise -- does not appear to violate the Federal Communications Act in any way. Before any SMR license is transferred to a third party after closing, the FCC must first grant transfer applications. Prior to such a transfer, Arch/PageNet would be in complete control over the operation facilities associated with those licenses.

40. There is no greater merit to Metrocall's argument that the Arch Plan violates the Bankruptcy Code. Metrocall complains that the Arch Plan treats creditors of

filing of a petition for reconsideration does not stay the effectiveness of an FCC order. 47 U.S.C. § 405(a). Consequently, the Wireless Bureau's Order of April 25, 2000, approving the Arch/PageNet merger was effective upon release and remains in effect. There is no FCC bar to Arch and PageNet consummating this merger notwithstanding Metrocall's untimely filings at the FCC.⁴

Even if the FCC had not yet approved the Arch/PageNet merger, the pendency of Metrocall's petition to the FCC would not affect this Court's jurisdiction to confirm the Plan. Confirmation of the Plan by this Court does not divest or limit in any way the FCC's jurisdiction over the transfer of FCC licenses any more than the FCC's approval of the Arch/PageNet merger on April 25, 2000 limits or divests this Court of its jurisdiction to confirm or not confirm the Plan. There are a number of conditions to closing the Arch/PageNet merger. One condition is confirmation of the Plan. (PageNet Plan, Article IX, A.1 and 2). Another condition is FCC approval. (PageNet Plan, Article IX, A.3 and Merger Agreement, Section 7.1(c)). The order in which such approvals are obtained does not limit or impair the other approving entity's jurisdiction.

Indeed, it is common practice for the bankruptcy court to approve the sale of FCC licenses prior to FCC action authorizing the transfer. For example, in Pyle Communications of Beaumont, Inc., 4 FCC Rod 8625 (1989), Pyle Communications filed applications to renew the station licenses for its Stations KWIC and KWIC-FM. *Id.* The renewal applications were contested and during the pendency of the challenge, bankruptcy proceedings were instituted against Pyle Communications. The Bankruptcy Court subsequently approved a plan under

⁴ See *Applications of Chapman S. Root Revocable Trust*, 8 FCC Rod 4233, 4224 (1993) (stating "Section 1.103 of the Commission Rules states that the filing of an appeal will not stay the effectiveness of a Commission decision.").

CERTIFICATE OF SERVICE

I, Veronica Blakeney, a secretary with the law firm of Alston & Bird LLP, hereby certify that on the 4th day of October, 2000, I served the foregoing Motion for Stay Pending Reconsideration by first-class U.S. mail, postage prepaid, upon the following:

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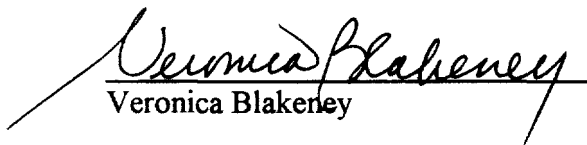
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